IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGMENT NO.416 OF 2005
IN
SUMMARY SUIT NO.3287 OF 2001

New Multifab Engineers P.Ltd. ..Plaintiff

Vs.

Bharat Exploxives Ltd. ..Defendants

Mr.Y.K.Sharma i/b Ganesh and Co. for the plaintiff

Mr.Shailesh Shah i/b Thakoredas & Madgaonkar for the defendants

CORAM : S.U.KAMDAR, J
DATED : 30TH JANUARY, 2006

P.C.:

1. The present summons for judgment is taken out in a suit which has been filed by the plaintiff for the recovery of sum of Rs.4,75,706. According to the plaintiff outstanding amount is Rs. 3,13,351/- and interest amount is Rs.1,62,355/-.

2. The aforesaid claim arises in the present case on the basis of a contract which is annexed at Ex.A being contract dt.29.1.90. The said contract was for fabrication and supply of two numbers of Aluminium Tanks for storage of Concentrated Nitric Acid. Various terms and conditions were set out

therein. It is the case of the plaintiff that the said goods were sold and delivered by the plaintiff to the defendant and as per the contract price, defendants were liable to make payment of Rs.7,35,904/-. Out of Rs.7,35,904/- two part payments were made. Rs.3,47,553/- on 8.11.91 and Rs.75,000/- on 3.1.92 leaving behind the principal amount of Rs.3,13,351/-. On the said amount, plaintiff has claimed interest @ 18%.

3. The learned counsel for the defendant has first of all contended that this court has no territorial jurisdiction to entertain and try the present suit and thus the present suit is liable to be dismissed for want of jurisdiction. While considering the case of jurisdiction certain facts are required to be set out. It is not in dispute that the agreement at Ex.A which has been signed at Delhi was sent to Bombay and in Bombay plaintiff accepted the said contract. It is not in dispute that the goods are despatched from Bombay. According to defendant, the same are sent to their factory in the state of Uttar Pradesh. Under the terms and conditions of the said contract, payments were

required to be made for 10% of the basic price as advance against acceptance of this order, 30% of basic price as advance against procurement of acceptable major raw material, 50% of basic price plus taxes after inspection / approval of material and 10% of basic price after expiry of performance guarantee period.

4. The learned counsel for the plaintiff has contended that part of cause of action namely the acceptance of order and despatch of delivery of goods has admittedly effected in the state of Uttar Pradesh. According to the defendant since delivery was effected from factory premises i.e. Thane that part of cause of action has also arose outside the territorial jurisdiction of this court. However, it is not disputed that the balance cause of action including payments have arose at Bombay. In my opinion, a part of cause of action has arose within the territorial jurisdiction of this court.

5. Further more, it is not in dispute that invoice contains clause (subject of Mumbai Jurisdiction) and thus the parties to the agreement

have conferred Jurisdiction on this court. If part of cause of action has arose within territorial jurisdiction of this court then parties by agreement can confer a jurisdiction to a court which has concurrent jurisdiction. In that view of the matter contention of the defendant that this court has no jurisdiction has no merits and the same is required to be rejected.

6. The next contention advanced by the learned counsel for the defendant is that there was delay in taking out Summons for Judgment of almost 4 years i.e. plaintiff has numbered the suit in 2001 though lodged in 1994 but no summons for judgment was taken out till 2005. In so far as this contention is concerned, there is no dispute that in 2002 plaintiff took out Notice of Motion being Notice of Motion No.1277 of 2002 for dismissal of suit and de-registeration thereof. By order dt.17.6.05 the court has condoned delay from September 1994 till August 2000 and has kept issue open in respect of delay in taking out Summons for Judgment.

7. Thus at the earliest, plaintiff could have taken out summons for judgment immediately after dismissal of notice of motion which was only on 17.6.05. It cannot be considered that there is such a delay in taking out summons for judgment and that it cannot be explained. I am of the opinion that in the light of the judgment of the full bench, this is a fit case for condonation of delay in taking out Summons for Judgment and the same is accordingly condoned.

8. Now turning to the next contention on merits, the learned counsel for the defendant has contended that the suit claim is barred by law of limitation. He has contended that plaintiff has taken into consideration that suit is within time as on the date of lodging of suit but according to him because plaintiff did not make payment of court fees, there was no valid presentation and therefore date of lodging cannot be taken into consideration but the date on which suit is numbered should be taken into consideration. Thus, according to the defendant, claim is barred by law of limitation.

9. In my opinion, aforesaid argument is devoid of any merits. Once a suit is lodged under the provisions of Limitation Act, limitation period stops running. The fact of payment of proper court fees or non payment of appropriate court fees cannot continue to run the limitation period and therefore contention that suit claim is barred by law of limitation on the aforesaid basis has to be rejected.

10. Even if presentation of the suit was not proper then it was open for the office to dismiss the said suit in exercise of power under section 986 of the High Curt Rules (O.S.) which office has not exercised and such non exercise cannot deprive the plaintiff of a suit claim on the ground of period of limitation as contended by the learned counsel for the defendants herein.

11. The next contention advanced by the learned counsel for the defendants is defendants themselves are entitled to liquidated damages due to the delay in delivery of the tanks. He has drawn my attention to the contract at Ex.A which interalia

provides for a delivery period and for liquidated damages as under:

> "5. Delivery:
>
> Sixteen weeks from the date of placement of order.
>
> 6. Liquidated Damage:
>
> In case of delay on your part the liquidated damage will be charged @ 1/2% (half per cent) per week subject to maximum of 5%. Notwithstanding liquidated damages the time is the essence of the order."

12. He has also drawn my attention to the clause for liquidated damages. It has been contended that thus plaintiff is entitled to claim liquidated damages for delay in delivery. As against this, the learned counsel for the plaintiff has drawn my attention to letter dt.25.6.92 which is at Ex.C to the plaint under which it has been recorded that though there was some delay in delivery of goods due to 'Force Majeure' conditions, parties have agreed to settle the claim of damages only at Rs.70,000/- and the balance amount has to be paid by defendant to plaintiff therein. There is no doubt that letter dt.25.6.92 is not replied at all nor any claim for damages has

been raised by defendant right up to the date of filing Affidavit in reply to the Summons for Judgment i.e. in 2005. The fact that defendant has not raised the claim for liquidated damages all throughout from 1992 till 2005 and the fact that letter dt.25.6.92 was never replied by the defendant, I do not find any substance in the defence raised by the defendants in the present suit. Asuming that there is any such liquidated damage it is required to be proved by the defendant and defendant cannot refuse to make payment of the goods sold and delivered on the purported ground that there is any claim for liquidated damages.

13. The last submission of the learned counsel for the defendant is that they are entitled to claim for travelling expenses of Rs.70000. However, he has fairly conceded the said claim is not relatable to any clauses of the agreement between the parties. In that light of the matter also, there is no substance in the aforesaid defence. However, with a view to give an opportunity to the defendants to defend the suit, I direct the defendants to deposit a sum of Rs.3 lacs

within 4 weeks failing which plaintiffs will be entitled to decree. If the said amount is deposited the Prothonotary and Senior Master is directed to invest the same in any Nationalised Bank in Fixed Deposit initially for a period of 3 years and then renew the same from time to time till further orders of this court. If the amount is deposited then suit is to be transferred to the list of Commercial Causes. Written Statement or points of defence to be filed within four weeks from the date of deposit of the said amount. Affidavits, list of documents to be filed within four weeks thereafter. Inspection within four weeks thereafter. Suit to be on board of the learned Judge taking Commercial Causes.